

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GULF HAULAGE HEAVY LIFT CO.,)
Petitioner,)
VS.) CIVIL ACTION NO.
SWANBERG INTERNATIONAL, LTD.,) 4:18-CV-4392
Respondent.)
)

MOTION HEARING
BEFORE THE HONORABLE ALFRED H. BENNETT
APRIL 26, 2019

APPEARANCES:

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10:59:44 1 **THE COURT:** Cause No. 4:18-cv-4392, Gulf Haulage Heavy
2 Lift Co. versus Swanberg International. Counsel, please
3 announce your appearances for the record.

10:59:56 4 **MR. NICHOLS:** Denton Nichols of Norton Rose Fulbright
5 for petitioner, Gulf Haulage Heavy Lift Co., and I'm joined here
6 by my colleague from the firm, Lena Serhan, also for petitioner.

11:00:06 7 **THE COURT:** Your last name?

11:00:07 8 **MS. SERHAN:** Serhan.

11:00:09 9 **THE COURT:** Spell it.

11:00:10 10 **MS. SERHAN:** S-E-R-H-A-N.

11:00:14 11 **THE COURT:** Very well. Thank you.

11:00:15 12 **MR. ASHBY:** Kit Ashby with Ashby LLP for respondent,
13 Swanberg.

11:00:20 14 **MR. DAVIS:** Brian Davis with Crinion Davis &
15 Richardson, also for respondent, Swanberg.

11:00:26 16 **MS. ASHBY:** Leslie Garcia Ashby with Ashby LLP also
17 for the respondent, Swanberg.

11:00:31 18 **THE COURT:** Very well. Thank you, Counsel.

11:00:36 19 We're here for a motion hearing, the motion for entry
20 of order confirming the arbitration award and judgment, the
21 motion to modify petitioner's motion pursuant to 9 U.S.C.
22 Section 6 and 20- -- 208, and the opposed motion to vacate; is
23 that correct?

11:00:57 24 **MR. NICHOLS:** I believe so, Your Honor, although I
25 would submit to the Court that the second motion that Your Honor

1 referred to, the motion to modify the scheduling order, may well
2 be moot at this point.

11:01:08 3 **THE COURT:** Very well.

11:01:09 4 **MR. ASHBY:** We agree, Your Honor.

11:01:12 5 **THE COURT:** The motion for entry was filed first, so
6 we'll start there.

11:01:18 7 **MR. NICHOLS:** Thank you, Your Honor.

11:01:19 8 Your Honor, we appear again before you after the last
9 initial conference we had in front of Your Honor on March 1st of
10 this year. The procedural posture of this case is substantially
11 the same as it was then.

11:01:34 12 As Your Honor noted at the outset, there are two
13 competing motions in front of the Court, one to confirm the
14 arbitral award that was entered and binds the parties here in
15 Saudi Arabia, and a second motion by Swanberg to vacate that
16 same award.

11:01:53 17 At the outset, I would like to give the Court a bit of
18 an overview of the New York Convention and the standard by which
19 it will be judging this case here today. The Convention, in
20 Chapter 2 of the Federal Arbitration Act, which implements the
21 Convention, mandates an expeditious and summary procedure to
22 confirm for arbitral awards. The Convention has been entered
23 into by, I believe, over, now, 170 countries, including, of
24 course, the United States and Saudi Arabia.

11:02:26 25 And the Convention provides for a rather unique

1 framework for considering these types of applications, and it's
2 explained by the Fifth Circuit and other courts of appeals.
3 There are basically two types of jurisdictions recognized under
4 the Convention. The first are the courts of primary
5 jurisdiction, which are the courts that sit in the same state or
6 jurisdiction where the arbitration award was rendered, and, of
7 course, that is, in this case, Saudi Arabia.

11:02:56 8 Then you have the courts of secondary jurisdiction.
9 Those are the courts who are sought to enforce the award in a
10 foreign country where that award was rendered in a country of
11 primary jurisdiction, and, of course, this court is a court of
12 secondary jurisdiction for purposes of today's application.

11:03:19 13 The terms of the treaty are a matter of United States
14 public policy and a matter of treaty obligation. For that
15 reason, the discretion of this Court is extraordinarily limited,
16 and the review that this Court may conduct is also
17 extraordinarily limited.

11:03:37 18 Let me just start with what is undisputed here. The
19 case -- it is undisputed in this case that this application
20 properly falls under the Convention. In fact, I believe
21 Swanberg, in its answer, has admitted all of the facts that this
22 Court would need to determine, for instance, that the award was
23 rendered in one signatory country to the Convention, and it --
24 enforcement is being sought in another signatory of the
25 Convention, and that the arbitration producing the award arose

1 out of a commercial dispute.

11:04:10 2 All those facts have been admitted, and that is the
3 only burden that GHHL has before the Court today. It's the only
4 burden we need to discharge, and we could just sit down, and
5 this Court -- and we'll go through what Swanberg says, but we
6 have met our burden to have this award confirmed.

11:04:30 7 Conversely, as Your Honor knows, there is a motion by
8 Swanberg to vacate the award. To be clear, under the framework
9 of the Convention, this Court has no jurisdiction to vacate the
10 award, to modify the award or to correct the award --

11:04:46 11 **THE COURT:** No discretion or limited discretion?

11:04:50 12 **MR. NICHOLS:** In reality, Your Honor, zero discretion
13 because there is no jurisdiction because under the framework of
14 the New York Convention, as I mentioned at the top of this
15 discussion, there are courts of primary jurisdiction, who can
16 hear the full panoply of potential objections under their
17 nation's respective laws to recognition and enforcement and
18 confirmation of an award, and only those courts are permitted to
19 vacate an arbitration award.

11:05:23 20 Conversely, where the New York Convention controls, as
21 it does here, the courts of secondary jurisdiction have only one
22 decision to make, and that's whether or not to confirm the
23 award. And according to Section 207 of the Federal Arbitration
24 Act, this Court shall confirm the award unless the party
25 opposing the award proves one of the grounds specified in the

1 Convention for refusing enforcement.

11:05:54 2 I paraphrased that slightly, but I believe I
3 represented to the Court accurately those key terms.

11:06:00 4 So this Court, in fact -- and I stand by it -- has no
5 jurisdiction to vacate, and that right there means that this
6 Court can summarily deny the motion to vacate that has been
7 proposed by Swanberg.

11:06:16 8 Now, that leaves only one issue before this Court,
9 which is whether or not to confirm the award, which means,
10 basically, is this Court going to recognize and enforce that
11 award and give it the effects of the judgment of this Court?

11:06:34 12 Swanberg has raised a number of purported grounds in
13 its motion, which it also styles, in the alternative, as an
14 opposition to our motion to confirm, but I don't believe it
15 would be entirely unfair for us to characterize those grounds as
16 being frivolous, and we'll just take them one by one.

11:06:51 17 To start, Swanberg has alleged to this Court and
18 represented to this Court that the award before it is on appeal
19 in Saudi Arabia. To be very clear, there was only one appeal of
20 that award. This award was rendered in April of 2017.

11:07:10 21 I understand that Swanberg filed its application to
22 set aside the award in Saudi Arabia in either November or
23 December of that year. That award -- excuse me. That
24 proceeding was decided definitively against Swanberg in early
25 2018, and it was terminated, and that's even before we initiated

1 an application in this court to confirm the award.

11:07:37 2 When we initiated our application in this court to
3 confirm the award, there were no proceedings pending in
4 Saudi Arabia, but what happened is after we served Swanberg with
5 the petition, Swanberg went back to its Saudi counsel and sought
6 to file another proceeding in Saudi Arabia, not to appeal the
7 award, not to challenge it, not to set it aside, as it claims,
8 but, rather, to initiate a new arbitration.

11:08:04 9 And fortunately, Your Honor, the Saudi court saw
10 through what Swanberg was trying to do, which was to disrupt the
11 potential enforcement of this award in the United States, and it
12 has already disposed of Swanberg's petition and denied it. So I
13 don't believe there's going to be any question that this award
14 is final and binding and conclusive on the parties in Saudi
15 Arabia. So that potential ground for refusing confirmation is
16 off the table.

11:08:32 17 The next ground that Swanberg raises is that the
18 arbitrators were not appointed in accordance with the parties'
19 agreement and that the arbitration procedure, likewise, did not
20 accord with the parties' agreement. This argument is, likewise,
21 entirely frivolous. The operative arbitration agreement here is
22 the March 10th, 2016, arbitration agreement whereby Swanberg's
23 Saudi counsel and GHHL's Saudi -- Saudi counsel signed a
24 document called "Arbitration Agreement" setting forth the
25 precise terms under which they would arbitrate their dispute.

1 And there is no dispute in this case, none, Your Honor, that the
2 proceeding proceeded in accordance with that arbitration
3 agreement.

11:09:22 4 So what is the nature of Swanberg's challenge?

5 Effectively, they argued that a previous arbitration clause in
6 one of the commercial agreements was not complied with in
7 certain procedural respects. But it's crucial to note,
8 Your Honor, that in the arbitration agreement, the one that they
9 actually signed at the outset of the arbitration which named all
10 the arbitrators and decided the procedure to be followed, they
11 specifically said that this document shall control over the
12 shareholders' agreement that contains the arbitration clause.

11:09:55 13 So even if there's any variance between the two
14 documents, it's the later May 10th, 2016, agreement that
15 controls. And Swanberg's only argument to the --

11:10:08 16 **THE COURT:** May -- May -- what was the date?

11:10:11 17 **MR. NICHOLS:** It is a May 10, 2016, agreement,
18 according to my notes.

11:10:16 19 **THE COURT:** May 10th?

11:10:18 20 **MR. NICHOLS:** Yes, Your Honor.

11:10:19 21 **THE COURT:** Okay. Thank you.

11:10:22 22 **MR. NICHOLS:** Swanberg's only argument for why this
23 Court should disregard that agreement is, effectively, that that
24 agreement is void, that a party's -- once they entered into an
25 arbitration clause, cannot vary the terms of their arbitration

1 agreement subsequently. And, Your Honor, Swanberg has presented
2 no authority to this Court for that proposition, none, zero,
3 and, in fact, it would be contrary to basic contract principles
4 and basic arbitration principles that arbitration is a matter of
5 consent between the parties.

11:10:56 6 And Swanberg, very expressly and through its counsel,
7 consented to this arbitration and, indeed, proceeded through
8 this entire arbitration without raising any of the objections to
9 the procedure that it does so now before this Court. Its -- its
10 argument on this point is frivolous.

11:11:15 11 Next, Swanberg has certain arguments relating to the
12 appointment of the arbitrator whom GHHL nominated to the panel.
13 Bear in mind, Your Honor, this was a three-party panel.
14 Swanberg nominated one arbitrator, GHHL nominated another
15 arbitrator, and the two arbitrators together selected the umpire
16 or sometimes called the chairman of the -- of the tribunal, and
17 that's how this -- that's how this panel was constituted. And
18 then that constitution, as I mentioned, was confirmed in the
19 May 10, 2016, arbitration agreement.

11:11:56 20 The problem with all of Swanberg's arguments against
21 the appointment of GHHL's arbitrator, just as a threshold
22 matter, is that they are brought under -- they're brought under
23 no authority of the New York Convention. As mentioned at the
24 outset, this Court has discretion to deny enforcement only if
25 Your Honor finds one of the grounds specified in the Convention

1 for denying enforcement. And the alleged ground here is that
2 this arbitrator did not disclose a one-time representation of
3 one indirect shareholder of GHHL, which rendered that particular
4 arbitrator, according to Swanberg, evidently partial.

11:12:43 5 The problem with that argument is that it -- it is not
6 supported by any of the text of the New York Convention, and
7 evident partiality is definitively not a ground which a court in
8 a secondary jurisdiction may refuse enforcement of an
9 arbitration award.

11:13:04 10 Moreover, the relevant ground that they're moving
11 under, they say that is their hook for this argument, is in the
12 Convention, that they were unable to present their case, which
13 is one of the grounds recognized in the Convention. And yet the
14 record of the arbitration, as memorialized in the arbitration
15 award, does not reflect in any way that Swanberg was unable to
16 present its case.

11:13:28 17 On the contrary, Swanberg and GHHL, for that matter,
18 submitted multiple grounds of pleadings, all of which were
19 admitted. There's no indication that the arbitrators refused to
20 hear any evidence, and so Swanberg has been unable to connect
21 this purported ground with anything that actually happened in
22 the arbitration. That is fatal to its claim that it was unable
23 to present its case, which is the only relevant protection that
24 Swanberg invokes with respect to this issue with the exception
25 of one other, which I'll deal with in a moment.

11:14:04 1 Moreover, Swanberg does not deny that it actually knew
2 of the circumstances that it now complains of during the
3 arbitration. And case law is clear that if you know of an
4 objection to evident partiality of an arbitrator, and you sit on
5 it, under the FAA, if that were applicable here, you have waived
6 that objection. And very clearly Swanberg has done so in this
7 case even if that objection had any foundation to begin with.

11:14:34 8 Also, I should mention that Swanberg has a public
9 policy argument, claims that it is against the public policy of
10 the United States for a party appointed arbitrator not to
11 disclose the circumstances at issue here. The problem with that
12 proposition, Your Honor, is that they give this Court exactly
13 zero case law to support it.

11:14:53 14 It's very clear from the Fifth Circuit that only the
15 public policies that implicate the most basic notions of
16 justice -- morality and justice are to be considered, and
17 Swanberg has provided this Court with no authority that the
18 circumstances here would implicate such a U.S. policy.

11:15:18 19 As another ground that Swanberg uses to attack the
20 award, they complain about the work of a -- the
21 tribunal-appointed expert here called TEST group. So for a
22 little background, the tribunal hired -- not -- not -- GHHL
23 didn't hire and Swanberg didn't hire, but the tribunal hired an
24 expert group to assess certain documentation in order to
25 determine certain claims in the arbitration.

11:15:51 1 And remember, the only relevant ground that Swanberg
2 invokes with respect to this appointment is that it was unable
3 to present its case.

11:16:00 4 And so what does Swanberg say? Well, it says, first,
5 that the TEST group had a past business relationship with GHHL,
6 which I presume they're saying rendered it biased towards GHHL,
7 and, also, that this particular group did not give due
8 consideration to all the documents which Swanberg had asked this
9 tribunal-appointed expert to review.

11:16:27 10 The problem with this argument, again, is -- let's
11 remember what context we're in here. We're under the New York
12 Convention, and the relevant ground here is whether or not
13 Swanberg was unable to present its case as a result of either of
14 these circumstances. Again, the arbitration record does not
15 bear that out, but even if all their allegations were taken as
16 true, it still would not prove that Swanberg was unable to
17 present its case.

11:16:54 18 Swanberg, belatedly, makes another argument -- which
19 is a bit outlandish, to say the least -- which is that before
20 the tribunal-appointed expert visited the site where GHHL has
21 its operations and where it had certain equipment that were at
22 issue in the arbitration, that GHHL disassembled this equipment
23 so that the TEST group, the tribunal-appointed expert, would see
24 it in a disassembled state and note that in its report and then,
25 after TEST group left, GHHL allegedly reassembled all this

1 equipment again.

11:17:32 2 Your Honor, this equipment -- these are 21 heavy duty
3 trucks that they're alleging were disassembled and then
4 reassembled. There's a number of problems with this allegation.

11:17:44 5 To start with, it just doesn't make any sense. TEST
6 group was not commissioned to assess the condition of the
7 equipment. It was commissioned to determine whether certain
8 costs had been incurred by GHHL in maintenance of that equipment
9 and to determine whether any -- whether that equipment had been
10 used to -- on any jobs and any fees had been generated from it.

11:18:13 11 Neither -- TEST group explicitly relied on
12 documentation that was submitted by the parties to determine
13 those issues. It did not rely on the condition of the
14 equipment. Moreover, contrary to Swanberg's insinuation, TEST
15 group was not there to evaluate or to give an appraisal of the
16 value of this equipment. And so why GHHL would go to the
17 trouble of disassembling 21 trucks doesn't make any sense, and,
18 moreover, it's been squarely denied by the affidavit of GHHL's
19 legal head and former general manager, Fahad Al Anazi.

11:18:57 20 So the -- the -- there are two problems -- there are
21 two types of problems here. One are just the pure legal
22 problems with the argument, and in order to establish fraud as a
23 potential exception to enforcement under the Convention, you
24 have to show some nexus between the alleged fraudulent activity
25 in the arbitration and the decision of the arbitrators.

11:19:17 1 But in this case, the arbitrators vary explicitly
2 premised their award on the parties' pleadings, namely, their
3 decision to mutually rescind their agreements between them. And
4 as a result of that, the arbitrators awarded relief that
5 reflected, effectively, that rescission. Each party was
6 returned the consideration that it gave under the agreements.
7 The condition of the equipment was simply not relevant.

11:19:44 8 So there is no legal nexus between what they've
9 alleged and what the decision was based upon, but there's
10 another fundamental factual problem, which is that, as even
11 Swanberg acknowledges, it must show that there was a fraud by
12 clear and convincing evidence, at a minimum.

11:20:03 13 But the only evidence that Swanberg has put forth to
14 show that GHHL allegedly undertook this pointless operation to
15 deceive the tribunal-appointed expert is the uncorroborated word
16 of a former GHHL employee who, Swanberg doesn't tell you, but we
17 do, was fired in September of 2018 for not following company
18 safety procedures, and who, subsequently, was hired by a
19 Swanberg affiliate in Saudi Arabia.

11:20:40 20 Your Honor, this witness's testimony is hopelessly
21 compromised. He, obviously, has an ax to grind, and it should
22 not be accepted as truthful.

11:20:53 23 Next, Your Honor, I want to address, very briefly, a
24 matter that arose to our attention only last week, which is that
25 on Friday, which was the original date that this hearing was

1 originally set, Friday, April 19, Swanberg raised objections to
2 the affidavit of Fahad Alnazi [sic], who, as I mentioned, was
3 the legal head -- or is the legal head and former general
4 manager of the company.

11:21:19 5 Our affidavit has been on file, Your Honor, since
6 February 22nd of this year, and yet Swanberg only filed this
7 objection two months later and a week before this hearing, and,
8 in fact, on the day that this hearing was previous- --
9 previously scheduled to take place. And we consider,
10 Your Honor, that the objections were filed clearly in
11 unreasonable time and are, therefore, waived.

11:21:43 12 But, moreover, the relief that Swanberg asks for in
13 the affi- -- in their objections, which is to strike that
14 affidavit, clearly cannot be granted. First of all, there is no
15 motion to support that relief; second, the objections to the
16 isolated portions of the affidavit are, on their face,
17 unmeritorious; and, third, even if any isolated part of the
18 affidavit were inadmissible, it would not merit striking the
19 entire affidavit.

11:22:10 20 But the most important point, and to link it back to
21 the inquiry that this Court has, is that even if all of our
22 evidence were ignored and all of Swanberg's evidence, much of
23 which we've objected to, were admitted and taken at face value,
24 this Court could still not refuse to confirm the award on the
25 facts before it.

11:22:33 1 Swanberg, not GHHL, bears the burden of proof on all
2 of these claims. We do not bear a burden to controvert those
3 claims, and Swanberg has not brought forth proof to establish
4 any valid recognized specified ground under the New York
5 Convention for denying enforcement.

11:22:55 6 Finally, Your Honor, I'd just like to bring back to
7 the Court's attention something we mentioned in our motion for
8 confirmation, which is that we believe that this is a case that
9 merits the award of attorneys' fees. Swanberg's evasive tactics
10 in this case have been, in our view, obstructive, deeply
11 inequitable and an abuse of the process.

11:23:16 12 And under these circumstances, the Fifth Circuit
13 recognizes, along with other federal courts, that this Court has
14 the inherent power and obligation, even, to award attorneys'
15 fees where the opposition to confirmation of the award is
16 without justification, just as it is here. And, therefore, in
17 the Court's forthcoming order, we would respectfully request
18 that it set a procedure to allow GHHL to make that claim for
19 attorneys' fees.

11:23:43 20 And in closing, Your Honor, GHHL requests confirmation
21 of the award and a judgment in the amount set forth in our
22 petition, inclusive of prejudgment and post judgment interest,
23 costs and attorneys' fees. And at this time I will take
24 questions of the Court.

11:24:00 25 **THE COURT:** Thank you, Counsel.

11:24:06 1 **MR. ASHBY:** Thank you, Your Honor. I'm always worried
2 when my opponent tells me what my argument is. I have to go
3 back to the pleadings and look and determine that that is not my
4 argument.

11:24:13 5 In short, first of all, the title of our document was
6 a motion to vacate and, in the alternative, response. They
7 titled their motion a motion to confirm. I think it was a
8 motion to enforce. So out of abundance of caution -- but it's
9 the same arguments.

11:24:25 10 Essentially, there are two undisputed --

11:24:28 11 **THE COURT:** Bring your mic a little bit closer to you.

11:24:31 12 **MR. ASHBY:** Sorry, Your Honor.

11:24:36 13 **THE COURT:** Thank you.

11:24:36 14 **MR. ASHBY:** Thank you.

11:24:37 15 There are two undisputed arguments or facts, one of
16 which is actually admitted. The first is that one of the
17 arbitrators was the then-legal representative of not just some
18 stockholder, but the chairman of GHHL. If you look at the MOU,
19 the shareholder agreement and asset purchase agreement, this
20 individual signed all of them, and he's being referred to as the
21 partner.

11:24:59 22 Now, he may not -- no longer be employed or may no
23 longer be the representative, as the affidavit states, but back
24 when they filed their appeal, which is included as Exhibit G,
25 the counsel for GHHL at that point said, Our reply said that

1 arbitrator is a legal representative, current tense. At that
2 time their argument was, Well, there's a difference between the
3 person and the entity.

11:25:25 4 They now classify it as trivial, but they don't tell
5 us what the matter was at the time. It's all conclusory. But
6 the un- -- what they said at the time, I advocate as a judicial
7 admission, that at the time of the arbitration, that arbitrator
8 was the legal representative of GHHL, and they don't dispute it
9 in their initial pleadings -- or the response.

11:25:45 10 Secondly, undisputed is that this fact was not
11 disclosed. You have the declaration of Saeed. He said, Had we
12 known it, we would have objected. You can't object to what you
13 don't know. So saying now, Well, you didn't say anything about
14 it, is a little twisted.

11:26:01 15 We can't object to what we don't know. We didn't know
16 until after the fact, and the Saeed aff- -- declaration says
17 that.

11:26:06 18 Now, this Court is not a rubber stamp of other
19 countries' arbitrations. Specifically, seven reasons are given
20 why judgments should not be enforced. These two facts trigger
21 three of them.

11:26:23 22 The first is under V(1)(b), which is, essentially, the
23 due process, we've given you *Iran* -- excuse me, *Iran Aircraft*,
24 which tells you the fundamental requirement of due process is
25 the opportunity to be heard at a meaningful time in a meaningful

1 manner. And I'm -- *Karaha Bodas Company* tells you a fundamental
2 fair hearing is one that meets the minimal requirements of
3 fairness, adequate notice, a hearing on the evidence, and
4 impartial decision by the arbitrator.

11:26:54 5 Now, two things trigger this one. The first is there
6 was no impartiality. There was an arbitrator who was a lawyer
7 for the other side. Secondly, though counsel disputes it, the
8 arbitrators appointed TEST, who were charged with the two things
9 counsel says, one, to figure out the condition of the
10 evidence -- of the equipment, and then, second, to figure out
11 the revenue.

11:27:16 12 TEST, in their very own report, says that our counsel
13 attempted to provide evidence of those two issues. The first
14 were photographs of the equipment. These were photographs that
15 GHHL used on their website showing the condition of the
16 equipment, which was vastly different than it was on
17 December 2016.

11:27:34 18 And what I can only imagine is a defense in some
19 strange parallel universe, GHHL says, Well, these photographs
20 could have been manipulated for the purpose of deceit. These
21 were GHHL's photographs. Clearly, they had the originals, and
22 who else but GHHL would have manipulated them? But for that
23 reason, that evidence was not allowed. We were not allowed to
24 present our case to the arbitrator.

11:27:56 25 Secondly, they were supposed to determine the revenue

1 stream. As you have from the affidavit of Mr. Newcomb and from
2 Saeed, when they do a job, when the new company does a job, they
3 will present a spreadsheet which will show which vehicles were
4 used and the amount charged. Our attorney attempted to present
5 that to TEST.

11:28:16 6 GHHL's argument -- and this is all in the TEST
7 report -- says that, Well, that spreadsheet could have been
8 manipulated. This was GHHL's spreadsheet. They had it. But
9 for that reason, that spreadsheet was not taken into evidence,
10 and they say repeatedly they would not consider those.

11:28:31 11 And at the end -- the last page of the last entry was
12 that TEST found no revenue because of no documentation. Well,
13 because they wouldn't take our documentation. Those two things
14 fall squarely within the first defense I mentioned.

11:28:47 15 The second one is under 5(1)(d), the public policy.
16 Now, counsel's right. It's a narrow, narrow finding, but if a
17 fair hearing -- if due process doesn't fall in that exception,
18 nothing does.

11:29:06 19 **THE COURT:** In regards to the appeal of the
20 arbitration which was undertaken, I assume that some of the
21 points that you're raising now were presented in that appeal
22 such that they could determine whether or not the original
23 arbitration award was valid. Is that correct?

11:29:25 24 **MR. ASHBY:** I believe the fact that the arbitrator was
25 biased was raised at the appeal.

11:29:31 1 **THE COURT:** All right.

11:29:32 2 **MR. ASHBY:** I don't know about that. But even so,
3 sir, any finding by that company -- and, in fact, *Iran* speaks to
4 this. This Court -- this Court alone rules on the seven
5 exceptions. We don't cede that power to anybody else. There is
6 no *res judicata*. We don't say, Well, because you found that,
7 our hands are tied.

11:29:51 8 You and you alone get to decide the facts on those
9 seven elements.

11:29:56 10 **THE COURT:** I understand that, but my question -- you
11 make the point and counsel made the point in his presentation
12 that some of these issues were alleged not to have been
13 presented to the arbitration panel. And it may be true that it
14 was not originally presented, but I'm trying to inquire as to --
15 as to the appeal of the arbitration before that body there,
16 whether or not those issues were then presented such that they
17 had a full and fair consideration, if not in the original
18 proceeding, in the appeal proceeding.

11:30:35 19 **MR. ASHBY:** The only evidence I have -- and that's the
20 records of those two -- of any issue being presented was that of
21 the biased arbitrator. I don't know about the TEST report nor
22 of whether the arbitration occurred pursuant to the agreement,
23 which is our third.

11:30:49 24 **THE COURT:** The other portion of it, that argument, I
25 think, that you asserted was that you were not allowed to

1 present your case. Was that a issue that was presented in the
2 appeal as well?

11:31:04 3 **MR. ASHBY:** Not like that, Your Honor. I don't think
4 the same context. It was more one of this arbitrator was
5 prejudiced; therefore, we did not get a fair hearing.

11:31:15 6 I don't think it was -- and I wasn't there,
7 Your Honor, but --

11:31:17 8 **THE COURT:** And the specific point I'm asking about is
9 the presentation of certain evidence being excluded from the
10 original arbitration panel. You mentioned the photographs and
11 things of that nature. As part of the appeal, did you later go
12 back -- your client later go back and say, We were prevented
13 from presenting, originally, this pertinent evidence, which may
14 have altered the decision?

11:31:49 15 **MR. ASHBY:** I don't recall reading that in the
16 documents that we have been presented. I have not specifically
17 inquired of that. I certainly can, if Your Honor's interested.

11:31:58 18 **THE COURT:** No. Very well. Very well. You may
19 continue.

11:32:00 20 **MR. ASHBY:** Thank you, Your Honor.

11:32:01 21 The Fifth Circuit has found that one reason for which
22 public policy would be appropriate, as far as not enforcing it,
23 would be fraud.

11:32:13 24 Hope I can find my notes.

11:32:17 25 Specifically, the Fifth Circuit says -- has recognized

1 that fraud requires a showing of bad faith during the
2 arbitration proceeding, such as undisclosed bias of an
3 arbitrator or willfully destroying or withholding evidence. You
4 don't have one affidavit, Your Honor, you have three.

11 : 32 : 34 5 And the question that I can never figure out, at least
6 initially, is: Why was equipment that was delivered and used
7 and working suddenly found in complete disrepair when TEST
8 showed up? We have the affidavits from people who drove them,
9 from people who worked with them, and they tell us that they
10 were in working order when they were delivered. Then, in
11 December 2016, they were disassembled. Then they were
12 subsequently reassembled and were put back into commission.

11 : 32 : 58 13 You have the affidavit from an attorney, who doesn't
14 tell you that he has any basis for any of the things he says,
15 whether he knows it works or not. You have no evidence that
16 refutes the fact that these trucks were being used, then
17 disassembled. The TEST reports -- reports shows -- or reports
18 that the trucks were inoperable, and then, we believe, they're
19 back in service. That would fall under the willful destruction
20 of evidence.

11 : 33 : 20 21 And, finally, the third point, Your Honor, counsel
22 brought up that there was a subsequent agreement that says that
23 the arbitration will be pursuant to the terms of the Saudi law.
24 In fact, it even reflects the numbers and the specific --
25 specification of the Saudi law, and counsel's given us that in

1 both their Exhibit 4 and their Exhibit 5. And those two say
2 that the arbitrator is to be unbiased, and if there is anything
3 that would give question to the impartiality of the arbitrator,
4 that must be disclosed.

11:33:57 5 It was not disclosed. There was a biased arbitrator.
6 Swanberg did not get the arbitration that it agreed to. For
7 that reason, that is a third reason.

11:34:08 8 Again, Your Honor, this Court is not a rubber stamp.
9 Frankly, Your Honor, they've already won. They have all the
10 equipment. They didn't pay for it. They used the equipment for
11 years. They have the money.

11:34:21 12 There is nothing else that can happen except that,
13 unless somehow this basic poor -- to be nice -- arbitration is
14 allowed to -- if they're allowed to pursue those remedies here.
15 Let me reverse it.

11:34:34 16 Could it possibly, possibly be proper to have an
17 arbitration before a biased arbitrator and allow that to be
18 enforced? That can't be the law.

11:34:46 19 **THE COURT:** And in regards to the public policy
20 argument, there has been ample precedent of not only the court
21 that I'm sitting in, but as well as the Fifth Circuit, other
22 circuits around the country and the United States Supreme Court.
23 There is a great deference to arbitration clauses and to
24 proceedings.

11:35:18 25 As you point out, there are certain instances where

1 those awards are not confirmed or even vacated or set aside.
2 But the default position is that arbitration is favored, and
3 when those -- when learned parties go into arbitration, the
4 results of those arbitrations are respected.

11:35:50 5 So starting at that default position, your argument is
6 to move the Court away from that based upon, I assume -- because
7 I've heard it now multiple times, your best argument is this
8 alleged biased arbitrator for which -- or it wasn't disclosed to
9 you. Had it been disclosed, obviously, your position is your
10 client would object -- objected, and, secondly, that that
11 arbitrator contaminated the result of the proceeding such that
12 the result should not be confirmed or respected in this court.

11:36:41 13 Is that correct?

11:36:44 14 **MR. ASHBY:** I believe that is correct, Your Honor.

11:36:45 15 **THE COURT:** All right.

11:36:57 16 Counsel made another point, and you didn't address it,
17 and that was the award being on appeal.

11:37:05 18 **MR. ASHBY:** Yes, Your Honor.

11:37:05 19 **THE COURT:** And so is it correct to say that there is
20 an actual appeal of this underlying award at this time?

11:37:16 21 **MR. ASHBY:** No, Your Honor. There was at the time we
22 filed it. Since we filed it and the hearing, that has been
23 resolved. There is no longer an appeal on file in Saudi Arabia
24 of this matter.

11:37:26 25 **THE COURT:** Very well.

11:37:48 1 Counsel made another argument on your behalf, that
2 being that the arbitration was not according to procedure. Is
3 the underlying argument -- or your argument on that issue, is
4 that regarding the disclosure of the alleged bias of the
5 arbitrator appointed by GHHL?

11:38:11 6 **MR. ASHBY:** Yes, Your Honor.

11:38:12 7 **THE COURT:** All right.

11:38:12 8 And, finally, two other final points. You would
9 concede that this is a court of secondary jurisdiction, not
10 primary jurisdiction, correct?

11:38:28 11 **MR. ASHBY:** Yes, Your Honor.

11:38:29 12 **THE COURT:** And, finally, counsel made a request that
13 attorneys' fees would be appropriate should they prevail. You
14 did not address that, and I'll give you a moment to do so.

11:38:41 15 **MR. ASHBY:** Thank you, Your Honor.

11:38:41 16 We do not believe attorneys' fees would be appropriate
17 in this basically because this was a flawed arbitration.
18 They're attempting to further perpetrate a -- a -- they used the
19 term "frivolous." I won't use a -- let's say a very bad
20 arbitration on -- on -- upon us. This was -- should never have
21 been brought.

11:38:59 22 They knew what was going on, and to bring it here
23 is -- does not -- should not grant them any attorneys' fees for
24 that.

11:39:04 25 **THE COURT:** Very well.

11:39:05 1 Counsel, any brief response? And I do mean brief.

11:39:10 2 **MR. NICHOLS:** I'll keep it very brief. Just one
3 thing.

11:39:12 4 **THE COURT:** Okay.

11:39:12 5 **MR. NICHOLS:** I think counsel has forgot Swanberg
6 brought this arbitration, not GHHL. They committed themselves
7 to the terms of this arbitration through the May 10, 2016,
8 agreement, which included the appointment of the arbitrator
9 that's in dispute before this Court. There is no judicial
10 admission before this Court that that arbitrator was a
11 representative of GHHL, of its parent companies, of its chairman
12 or anybody affiliated with GHHL at the time of the arbitration.

11:39:46 13 And if counsel can point this Court, kindly, to that
14 citation in the record, I would very much like to see that.

11:39:53 15 But, also, just -- just one more point on the
16 so-called three affidavits of fraud. They have only one
17 affidavit -- one affidavit that supports -- or is supposed to
18 support this notion of fraud, the notion that this equipment was
19 disassembled and then reassembled, and that is the affidavit
20 that comes from the former employee.

11:40:16 21 The other two affidavits they refer to, nowhere in
22 those affidavits do they allege that GHHL disassembled the
23 equipment. And if that is incorrect, then I'm sure counsel
24 would like to point out to the Court where that's incorrect, but
25 I submit that is not.

11:40:31 1 Your Honor, and finally, just on the point of
2 equities, counsel insinuated that we've already won. Far from
3 the case, Your Honor. If -- if this Court refuses confirmation,
4 it means that we would be unable to recover the money that was
5 paid by GHHL to purchase certain equipment from Swanberg. That
6 money, over \$5 million, went to Swanberg in 2013, and it has had
7 that money ever since then.

11:41:02 8 Conversely, GHHL has in its possession the equipment
9 in Saudi Arabia that Swanberg is referring to. What -- what I
10 believe Swanberg's tactic in this case is to wait and gamble and
11 see if this Court is going to refuse enforcement, which would
12 make it much more difficult, to say the least, for GHHL to
13 recover back its money, and yet Swanberg has not just an award,
14 but a judgment in Saudi Arabia that -- under which they would be
15 permitted to recover that equipment.

11:41:33 16 They could knock on the door of the -- GHHL the very
17 next day after this Court were to decide to refuse confirmation
18 and demand that equipment back, which means they keep the
19 equipment, and they keep the money. That is not fair,
20 Your Honor.

11:41:47 21 If there's anymore questions for the Court, I'd be
22 happy to address them.

11:41:50 23 **THE COURT:** On the issue of the legal representation
24 of -- counsel referred to him as the chairman. You made the
25 distinction that at the time of the arbitration, this

1 representation had ended. Is it correct to say -- and you can,
2 obviously, correct me. But is it correct to say that at some
3 point prior to the arbitration, in your view, that the appointed
4 arbitrator by GHHL had represented the chairman, whatever -- or
5 shareholder, whatever his position may have been, in a legal
6 matter, thus being his former attorney, and this person being
7 his former client?

11:42:44 8 **MR. NICHOLS:** Your Honor, the only knowledge I have
9 with respect to that is what is contained in the affidavit of
10 Fahad Al Anazi, which acknowledges that there was a one-time
11 representation of this particular arbitrator of an indirect
12 shareholder. I don't know if he was also the chairman --

11:43:02 13 **THE COURT:** That's the second time you've used that
14 phrase "indirect shareholder." What does that mean?

11:43:07 15 **MR. NICHOLS:** GHHL, as I understand it, is owned by
16 two parent companies, two holding companies, and this individual
17 is a shareholder of one of those two companies. That's how I
18 understand it.

11:43:18 19 **THE COURT:** All right.

11:43:19 20 Two questions. Do you know how long, prior to the
21 arbitration, this representation had ceased?

11:43:33 22 **MR. NICHOLS:** So, Your Honor, I have to confess that
23 the affidavit does not say one way or the other when this
24 alleged representation -- well, there was representation, but
25 when it began or when it ended. I don't know in -- temporally

1 speaking where in time it was.

1 1 : 4 3 : 4 7 2 And I just want to be clear with the Court. I did not
3 say that it had ended before the arbitration. I don't know when
4 that representation was in effect.

1 1 : 4 3 : 5 8 5 **THE COURT:** So you don't know if the representation
6 was even ongoing at the time of the arbitration?

1 1 : 4 4 : 0 3 7 **MR. NICHOLS:** No, I don't, Your Honor.

1 1 : 4 4 : 0 4 8 **THE COURT:** So it's possible that it was ongoing at
9 the time of the arbitration?

1 1 : 4 4 : 0 8 10 **MR. NICHOLS:** I don't know that, Your Honor. I --

1 1 : 4 4 : 1 0 11 **THE COURT:** You don't know if it's possible?

1 1 : 4 4 : 1 2 12 **MR. NICHOLS:** Me, my personal knowledge -- GHHL may
13 well know that, but me, personally, I don't know that. But I
14 would respectfully remind the Court that we don't bear the
15 burden of proof here. Swanberg does, and it has not pointed
16 this Court to any evidence that this particular arbitrator was
17 representing a chairman or an indirect shareholder of GHHL at
18 the time of the arbitration.

1 1 : 4 4 : 3 3 19 **THE COURT:** Well, in my consideration, it would be
20 important to know whether or not the representation was ongoing
21 at the time of the arbitration, or had it ended a month before,
22 six months before, or ten years before. It seems, to me, that
23 if an arbitrator is sitting in an arbitration -- and I don't
24 know what the arbitrator knew, obviously, and nor would anyone
25 sitting here.

11:45:06 1 If he knew that one of the parties to that
2 arbitration, that his former or then-existing client was a
3 shareholder in that, that would seem, to me, to be important,
4 which leads me to my second question.

11:45:26 5 Counsel has stated that this representation was not
6 disclosed at the time of the appointment of the arbitrator to
7 that panel. Do you concede that that's correct?

11:45:41 8 **MR. NICHOLS:** I don't have evidence that that is
9 correct or incorrect.

11:45:44 10 **THE COURT:** Okay. Well, let me ask it another way.
11 In regards to this representation, do you have any information
12 that it was disclosed?

11:45:56 13 **MR. NICHOLS:** I do not.

11:45:57 14 **THE COURT:** Secondly, in regards to the appeal of the
15 arbitration, are you aware if that was raised, as counsel has
16 asserted, as part of the appeal?

11:46:23 17 **MR. NICHOLS:** I know that GHHL raised an objection to
18 the appointment of this arbitrator on substantially the same
19 ground that it does so here. It might be slightly different
20 legal grounds because, obviously, they were examining the issue
21 under Saudi arbitration law as opposed to the New York
22 Convention, but the same substantive circumstances were in front
23 of the Saudi appellate court.

11:46:46 24 **THE COURT:** Thank you, sir.

11:46:50 25 Your final word, if any?

11:46:52 1 **MR. ASHBY:** I was just going to cite counsel to our
2 Exhibit G, page 3, subparagraph G, which their affiant says, "I
3 replied that said arbitrator is a legal representative, before
4 the honorable division, for Mr. Hussein Al-Anzani [sic] in
5 person." That's a present tense during the appeal.

11:47:14 6 **THE COURT:** So by way of making the point that it was
7 an ongoing representation, that's the evidence that is before
8 the Court?

11:47:21 9 **MR. ASHBY:** Yes, Your Honor.

11:47:22 10 **THE COURT:** Very well. Anything else, sir?

11:47:24 11 **MR. ASHBY:** No, Your Honor.

11:47:24 12 **THE COURT:** Thank you, Counsel. I appreciate your
13 fine oral presentations.

11:47:31 14 Counsel, anything else before we adjourn?

11:47:35 15 **MR. NICHOLS:** Just, Your Honor, I hope you will keep
16 in mind the narrow grounds of the Convention, but that's all.

11:47:39 17 **THE COURT:** You've made yourself clear on that point,
18 Counsel.

11:47:42 19 Counsel, anything else before we adjourn?

11:47:44 20 **MR. ASHBY:** No, Your Honor.

11:47:45 21 **THE COURT:** Very well. Enjoy your weekend. You're
22 excused.

11:47:47 23 **MR. ASHBY:** Thank you, Your Honor.

11:47:48 24 *(Proceedings concluded at 11:47 a.m.)*

1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above matter.

3
4 Date: May 2, 2019

5 /s/ Heather Alcaraz
6 Signature of Court Reporter

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